

FINAL AWARD ALLOWING COMPENSATION

(After Mandate from the Missouri Court of Appeals, Western District)

Injury No.: 08-058268

Employee: Gary Scott
Employer: Scott Excavating (Settled)
Insurer: Travelers Commercial Casualty (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Procedural History

On May 30, 2013, the Labor and Industrial Relations Commission (Commission) issued a final award denying compensation in this workers' compensation case. Employee filed an appeal with the Missouri Court of Appeals, Western District. In its decision filed January 14, 2014, the Court reversed the Commission's decision. *Scott v. Treasurer of Missouri-Custodian of the Second Injury Fund*, 417 S.W.3d 381 (Mo. App. 2014). The Court held that the Commission's findings of fact were not supported by competent and substantial evidence. By mandate dated February 5, 2014, the Court remanded this matter to the Commission for further proceedings consistent with the Court's opinion. Pursuant to the Court's mandate and decision, we issue this award.

Findings of Fact

Employee was 66 years of age at the time of the primary injury on January 11, 2008. Employee dropped out of school in the ninth grade and entered the workforce operating heavy equipment and doing excavation work. When he was 16 years old, employee incorporated his own excavating business, and has worked for that business ever since. Employee's duties for the business included operating heavy equipment and supervising employees. Employee has trouble reading and writing, so he relied on his employees to perform bookkeeping and administrative tasks. Employee's entire work history is limited to his experience running the excavation business.

Preexisting conditions of ill-being

Employee has experienced hearing difficulties since childhood. In 2002, doctors provided him with a cochlear implant. Employee's hearing problems limited his ability to use the telephone and made it more difficult to communicate with employees and customers at work. In his brief, however, employee concedes that this condition did not constitute a preexisting permanent partial disability.

In 1998, employee underwent shoulder surgery to repair a torn right rotator cuff. Employee's medical expert, Dr. P. Brent Koprivica, rated this injury at 15% permanent partial disability of the right shoulder. We find that employee suffered a 10% permanent partial disability of the right shoulder at the time of the primary injury.

On November 4, 2001, employee fell 22 feet from a grain bin and suffered a number of fractures in his right leg and both feet. Employee wore CAM walker boots on both legs for two years after this injury, and was unable to run his business during that time. When he returned to work, he used crutches for a year, and in 2005, received a

Employee: Gary Scott

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prescription for an ankle/foot orthosis. The ongoing effects of this injury prevent employee from walking more than 50 feet without pain, prevent him from standing for lengthy periods, and significantly reduce his ability to climb onto pieces of equipment such as bulldozers and excavators. Employee had to hire more workers to assist him as a result of this injury. Dr. Koprivica rated employee's disability referable to this injury at 35% permanent partial disability of the right ankle and 25% permanent partial disability of the left ankle. We find that employee suffered a 30% permanent partial disability of the right ankle and a 20% permanent partial disability of the left ankle at the time of the primary injury.

In 2004, employee underwent surgeries in connection with a diagnosis of bilateral carpal tunnel syndrome. In 2007, doctors diagnosed arthritis in employee's hands and feet; this condition causes employee to experience stiffness when it rains. Employee also suffered hernias in 2007, which were diagnosed but not immediately treated. Again, in his brief, employee concedes that none of these conditions constituted preexisting permanent partial disabilities.

Primary injury

On January 11, 2008, while operating a bulldozer over rough, frozen terrain, employee experienced the onset of severe pain in his low back. Employee's pain symptoms continued and were so severe that he ultimately underwent a decompressive lumbar laminectomy at L3-L4 on August 28, 2008. On October 29, 2008, the treating surgeon, Dr. Reintjes, opined that employee had reached maximum medical improvement and released employee to return to work with restrictions of no lifting over 50 pounds, limited bending and twisting, and no sitting for more than 1 or 2 hours at a time.

Employee settled his claim arising from the primary injury with the employer for a lump sum consistent with a rating of 22.5% permanent partial disability of the body as a whole referable to the low back. Employee eventually returned to work operating heavy machinery and supervising employees, but significantly limited his activities and took frequent breaks.

Dr. Koprivica assigned the following restrictions referable to the primary injury: employee should avoid sustained or awkward postures of the lumbar spine; avoid squatting, crawling, kneeling, and climbing; change postures frequently and limit standing or walking activities to 15 minutes or less, and sitting to one hour. Dr. Koprivica opined that the accident of January 11, 2008, is the prevailing factor causing employee to suffer a low back injury, and identified a synergistic effect between the primary injury and employee's preexisting disabling conditions. Dr. Koprivica rated the primary injury at 25% permanent partial disability of the body as a whole referable to the low back. We credit Dr. Koprivica's opinions regarding causation and synergy, and find that, as a result of the primary injury, employee sustained a 22.5% permanent partial disability of the body as a whole referable to the low back.

Conclusions of Law

Injury arising out of and in the course of employment

The parties asked the administrative law judge to determine whether employee sustained "an accident arising out of and in the course and scope of employment." *Transcript*, pages 2-3. It appears that the parties dispute whether employee suffered an

Employee: Gary Scott

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injury arising out of and in the course of employment. Section 287.020.3(2) RSMo provides, as follows:

An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The courts have interpreted the foregoing language to involve a “causal connection” test that employees must satisfy in order to prove that an injury has arisen out of and in the course of the employment. *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012).

We have found that on January 11, 2008, while operating a bulldozer over rough, frozen terrain, employee experienced the onset of severe pain in his low back, and we have credited Dr. Koprivica’s opinion regarding causation. There is no evidence on this record to suggest, let alone prove, that employee ever deviated from the course of performing his work for employer at the time of the primary injury. Nor is there any evidence that would suggest that the risk of operating a bulldozer over rough, frozen terrain was unrelated to employee’s employment; rather, all of the relevant evidence is to the contrary.

We must conclude that employee’s injuries arose out of and in the course of employment, because employee’s injuries did not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Second Injury Fund liability

Section 287.220.1 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in “all cases of permanent disability where there has been previous disability.” As a preliminary matter, the employee must show that he suffers from “a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed...” *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a “hindrance or obstacle to employment”:

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have found that employee suffered from preexisting permanent partially disabling conditions referable to the right shoulder and both ankles at the time of the primary injury. We are convinced that these conditions were serious enough to constitute hindrances or

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obstacles to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in greater disability than would have resulted in the absence of the condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

We have credited Dr. Koprivica's opinion that employee's primary injury combines synergistically with his preexisting disabling conditions. We conclude that the Second Injury Fund is liable for permanent partial disability benefits. We calculate Second Injury Fund liability as follows.

Employee's primary injury resulted in 22.5% permanent partial disability of the body as a whole, or 90 weeks of permanent partial disability. We have determined the extent of employee's preexisting permanent partially disabling conditions of ill-being as follows: 10% of the right shoulder (23.2 weeks), 30% of the right ankle (46.5 weeks) and 20% of the left ankle (31 weeks). The sum of preexisting and primary permanent partial disability is 190.7 weeks. When we multiply this sum by a 10% load factor to account for the synergistic interaction between the conditions, the result is 19.07 weeks.

The Second Injury Fund is liable for 19.07 weeks of permanent partial disability benefits at the stipulated rate of \$389.04, for a total of \$7,418.99.

Award

We reverse the award of the administrative law judge. The Second Injury Fund is liable for \$7,418.99 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Mark Siedlik, issued August 28, 2012, is attached hereto solely for reference.

This award is subject to a lien in favor of Keith Yarwood, Attorney at Law, in the amount of 25% for necessary legal services rendered.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 10th day of June 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

**FINAL AWARD DENYING COMPENSATION
As to Second Injury Fund Only**

Employee: Gary Scott Injury No: 08-058268
Dependents: N/A
Employer: Scott Excavating (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Insurer: Travelers Commercial Casualty (Settled)
Hearing Date: March 7, 2012
Briefs Filed: April 17, 2012 Checked By: MSS/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: 1/11/2008, 12/3/2009
5. State location where accident occurred or occupational disease was contracted: Urich, Henry County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted:
08-058268: Working on uneven terrain performing excavation work when he felt pain in his low back
09-104877: Placing a battery into equipment injured right shoulder
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease:
08-058268: back and body as a whole
09-104877: right shoulder
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? Unknown
17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate:
08-058268: \$742.72/389.04
09-104877: \$807.48/422.97
20. Method wages computation: stipulation
21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: N/A

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Gary Scott

Injury No: 08-058268

Dependents: N/A

Employer: Gary Scott Excavating (Settled)

Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund

Insurer: Travelers Commercial Casualty (Settled)

The above Claim was heard on March 7, 2012. The parties stipulated to the following:

08-058268

1. On 1/11/2008, Employee was employed with Gary Scott Excavating
2. On 1/11/2008, Employer was operating under and pursuant to the Missouri Workers' Compensation law.
3. Employer received proper notice.
4. Permanent partial and permanent total disability rates

09-104877

1. On 12/3/2009, Employee was employed with Gary Scott Excavating
2. On 12/3/2009, Employer was operating under and pursuant to the Missouri Workers' Compensation law.
3. Employer received proper notice.
4. Permanent partial and permanent total disability rates

ISSUES

The parties requested the Division to determine (for each injury number):

1. Whether claimant sustained an accident or occupational disease arising out of and in the course of his employment
2. The nature and extent of permanent disability, including the liability of the Second Injury Fund.

Gary Scott, the claimant, is a seventy year old Caucasian male. Mr. Scott dropped out of school after the ninth grade to begin working as an excavator. Mr. Scott's entire career has been as a self-employed business owner excavating with heavy equipment and bailing hay. He has

trouble reading so his now-deceased wife and employees managed the business bookkeeping tasks. Mr. Scott's work duties over his fifty year career included pulling himself into heavy equipment, working on uneven ground, and supervising employees.

Pre-existing Disabilities

Mr. Scott had an open rotator cuff repair to his right shoulder in 1998. Mr. Scott had difficulty climbing and using his right shoulder. (Report of Dr. Koprivica, 8).

On November 4, 2001, Mr. Scott fell 22 feet from a grain bin and had multiple midfoot/forefoot fractures on both the right and left side and fractured his right tibia and left fibula. Mr. Scott hired staff to operate the business for two years after this injury. In 2005 he reported to his physician that he had so much pain he was unable to walk further than 50 feet without rest. At that time Mr. Scott began wearing specialized orthotics on both of his feet.

Mr. Scott had cochlear implants placed in 2002 to address serious hearing loss that had been developing since childhood. He has a very limited ability to use the phone and also has problems hearing certain voices. Mr. Scott reported problems hearing at work and that he may have lost work because of his hearing problems.

In 2007, Mr. Scott had problems with hernias. He had four hernias and his treatment included surgery. Dr. Wetzel and/or Dr. Scott asked Mr. Scott to quit working because of her hernia problems. It affected his ability to lift and bend on the job.

1/11/2008 Injury

Mr. Scott injured his low back on January 11, 2008 when he was driving a bulldozer over rough, frozen terrain. He developed spinal stenosis with noted neurogenic claudication which resulted in the development of disabling symptoms and a decompressive laminectomy at L3-L4. Mr. Scott reports severe low back pain and limitations on sitting and lifting associated with this injury.

12/3/2009 Injury

Mr. Scott was attempting to lift a 115 pound battery when he tore his right shoulder and chest. Dr. Rhoades performed an arthroscopic labral debridement and open subscapularis repair on February 23, 2010. Mr. Scott reports ongoing problems in his right shoulder. He limits his activities because he fears tearing his shoulder again.

Experts

Dr. Koprivica assigned: a 15% permanent partial disability rating to Mr. Scott's pre-existing shoulder problems at the 232 level, a 35% permanent partial disability rating to Mr. Scott's pre-existing 155 week level of the right leg, a 25% permanent partial disability rating to Mr. Scott's pre-existing left lower extremity above the ankle at the 155 week level, a 10% permanent partial disability rating to Mr. Scott's pre-existing hernia condition to the body as a whole. Dr. Koprivica declined to rate Mr. Scott's hearing loss but indicated it was a hindrance or

obstacle to employment. Dr. Koprivica assigned a 25% permanent partial disability to the body as a whole rating to Mr. Scott's 2008 back injury and a 20% permanent partial disability to the body as a whole rating to Mr. Scott's right shoulder and chest injury.

Dr. Koprivica suggested Mr. Scott should avoid any activity above the shoulder due to his right shoulder condition. He should avoid pushing or pulling with the right shoulder. He should also avoid repetitive reaching with the right arm. Mr. Scott should avoid frequent or constant bending at the waist, pushing, pulling or twisting. He should avoid sustained or awkward postures of the lumbar spine. He should avoid squatting, crawling, kneeling or climbing. He should have the ability to change postures, limiting standing and walk to fifteen minutes with flexibility of sitting when necessary. Prolonged sitting should be restricted to one hour with flexibility to get up when needed.

Mike Dreiling, a vocational expert, concluded that Mr. Scott was unemployable based on his vocational profile and his medical disability and limitations.

CONCLUSIONS AND FINDINGS

Mr. Scott was unemployable on the open labor market before either his January 11, 2008 or December 3, 2009 work injuries

For Second Injury Fund liability for permanent and total disability to exist, the previous disability and the last injury must combine together to result in permanent and total disability. V.A.M.S. § 287.2201, subd. 1. Mr. Scott is permanently and totally disabled as a result of his previous disabilities alone, and was not employable on the open labor market at the time of his 2008 and 2009 work injuries, in spite of working. His numerous disabilities pre-existing his 2008 work injury are outlined:

Mr. Scott tore his right rotator cuff in 1998. Dr. Koprivica noted disability from this injury in regard to climbing and using his right shoulder.

Mr. Scott fell 22 feet in 2001 which shattered bones in his leg and feet. He spent two years with his leg in a CAM walker. This injury significantly limited his walking and he still has considerable problems from his this injury to his lower extremities. Mr. Scott reported after this 2001 right leg injury he had a very difficult time getting on and off machinery and only maintained employment by being self employed. He was able to put the brunt of the work on his employees and participate only by overseeing the work. Mr. Scott saw Dr. Bellamy from St. Luke's Medical on March 29, 2007. Dr. Bellamy recorded at that visit that Gary reported not being able to walk even 50 feet without having to stop and rest because of the discomfort. Dr. Koprivica suggested restrictions based on Mr. Scott's lower extremity disability: limit walking and standing to 15 minutes and avoid climbing.

He also has a history of major hearing problems which require cochlear implants. The hearing problems date back as far as middle school. He dropped out of school because he could

not hear the teacher. He reads very little and cannot operate a computer making it difficult for him to do tasks related to operating an excavating business.

In 2007, Mr. Scott had several hernias. Mr. Scott (Exhibit 1, 22-24) reported that he never recovered from his hernias and that Dr. Scott, his primary care physician, told him to stop working and that he had to quit working.

Mr. Dreiling testified that Mr. Scott was “at a very distinct disadvantage” in competing for training and supervisory jobs for another company considering his hearing, communication skills and educational background. When the severe pain, and physical restrictions he faced from his lower extremity injuries, his hernias, and his first shoulder injury, it is clear that the only reason Mr. Scott was able to work was because he was majorly self-accommodating as a business owner. Until his retirement, Mr. Scott did continue to earn an income because he owned his own business, but only because he made major accommodations for himself regarding what equipment he would operate, and relying on his wives to perform more intellectually demanding tasks. Mr. Dreiling agreed that Mr. Scott would not have the availability of self-accommodation in the open labor market like he did in his own business and that no jobs exist in the open labor market that would let him simply show other employees how to operate equipment without performing some work himself. (Exhibit B, 37). The Second Injury Fund is not liable for Mr. Scott’s 2008 and 2009 work injuries as his permanent and total disability arises based on his injuries that pre-date 2008.

Angus does not apply in this case, even though there is only one expert report submitted into evidence. Angus v. Second Injury Fund, 328 S.W.3d 294 (Mo. App. W.D. 2010). Angus specifically states “that the commission may not substitute an administrative law judge’s personal opinion on the question of medical causation of [an injury] for the uncontradicted testimony of a qualified medical expert.” Id. at 300. An expert’s opinion may be contradicted by his own testimony. Carkeek v. Treasurer, 352 S.W.3d 604, 610 (Mo. App. W.D. 2011). “Extent of disability. . . is not so medically technical as to remove it from the expertise that is attributed to the Commission. The question whether a claimant is totally and permanently disabled is not exclusively a medical question.” Id. at 610, citing Crum v. Sachs Elec., 769 S.W.2d 131, 136 (Mo. App. W.D. 1989). The current case focuses on causation of disability while Angus centered on medical causation of an injury. Angus, 328 S.W.3d 294 at 300.

The Court can properly determine that the cause for permanent and total disability was Mr. Scott’s pre-existing problems. First, because nature and extent of disability is at issue, and not medical causation, the Court is free to look to the whole record and not just to the medical expert in the case. Nature and extent of disability is a separate issue from medical causation and extent of disability is not medically technical. Carkeek, 352 S.W.3d at 610. Second, according to Mr. Scott’s testimony, at least one doctor asked him to stop working when he began having hernias in 2007. Third, because the issue in this case is not medical causation of an injury, it is appropriate for the Court to make findings of fact regarding Mr. Scott’s abilities and disability before the last accident. Carkeek, 352 S.W.3d at 610. As outlined above, Mr. Scott’s hearing problems since childhood, his extremely limited ability to walk due to foot injuries, problems

from his first shoulder injury, and the pain and lifting limitations associated with his hernias, Mr. Scott was clearly permanently and totally disabled before 2008 and as such unemployable on the open labor market.

I find therefore, the Second Injury Fund has no liability to the Claimant for the injuries claimed on November 1, 2008 or December 3, 2009, and award no compensation.

Made by: _____

Mark Siedlik
Administrative Law Judge
Division of Workers' Compensation

FINAL AWARD ALLOWING COMPENSATION

(After Mandate from the Missouri Court of Appeals, Western District)

Injury No.: 09-104877

Employee: Gary Scott
Employer: Scott Excavating (Settled)
Insurer: Travelers Commercial Casualty (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Procedural History

On May 30, 2013, the Labor and Industrial Relations Commission (Commission) issued a final award denying compensation in this workers' compensation case. Employee filed an appeal with the Missouri Court of Appeals, Western District. In its decision filed January 14, 2014, the Court reversed the Commission's decision. *Scott v. Treasurer of Missouri-Custodian of the Second Injury Fund*, 417 S.W.3d 381 (Mo. App. 2014). The Court held that the Commission's findings of fact were not supported by competent and substantial evidence. By mandate dated February 5, 2014, the Court remanded this matter to the Commission for further proceedings consistent with the Court's opinion. Pursuant to the Court's mandate and decision, we issue this award.

Findings of Fact

Employee was 68 years of age at the time of the primary injury on December 3, 2009. Employee dropped out of school in the ninth grade and entered the workforce operating heavy equipment and doing excavation work. When he was 16 years old, employee incorporated his own excavating business, and has worked for that business ever since. Employee's duties for the business included operating heavy equipment and supervising employees. Employee has trouble reading and writing, so he relied on his employees to perform bookkeeping and administrative tasks. Employee's entire work history is limited to his experience running the excavation business.

Preexisting conditions of ill-being

Employee has experienced hearing difficulties since childhood. In 2002, doctors provided him with a cochlear implant. Employee's hearing problems limited his ability to use the telephone and made it more difficult to communicate with employees and customers at work. In his brief, however, employee concedes that this condition did not constitute a preexisting permanent partial disability.

In 1998, employee underwent shoulder surgery to repair a torn right rotator cuff. Employee's medical expert, Dr. P. Brent Koprivica, rated this injury at 15% permanent partial disability of the right shoulder. We find that employee suffered a 10% permanent partial disability of the right shoulder at the time of the primary injury.

On November 4, 2001, employee fell 22 feet from a grain bin and suffered a number of fractures in his right leg and both feet. Employee wore CAM walker boots on both legs for two years after this injury, and was unable to run his business during that time.

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When he returned to work, he used crutches for a year, and in 2005, received a prescription for an ankle/foot orthosis. The ongoing effects of this injury prevent employee from walking more than 50 feet without pain, prevent him from standing for lengthy periods, and significantly reduce his ability to climb onto pieces of equipment such as bulldozers and excavators. Employee had to hire more workers to assist him as a result of this injury. Dr. Koprivica rated employee's disability referable to this injury at 35% permanent partial disability of the right ankle and 25% permanent partial disability of the left ankle. We find that employee suffered a 30% permanent partial disability of the right ankle and a 20% permanent partial disability of the left ankle at the time of the primary injury.

In 2004, employee underwent surgeries in connection with a diagnosis of bilateral carpal tunnel syndrome. In 2007, doctors diagnosed arthritis in employee's hands and feet; this condition causes employee to experience stiffness when it rains. Employee also suffered hernias in 2007, which were diagnosed but not immediately treated. Again, in his brief, employee concedes that none of these conditions constituted preexisting permanent partial disabilities.

On January 11, 2008, employee suffered a low back injury while operating a bulldozer over rough, frozen terrain. In our award in employee's claim designated as Injury Number 08-058268, we have found that employee sustained a 22.5% permanent partial disability of the body as a whole as a result of this injury, as well as an additional 19.07 weeks of permanent partial disability owing to the synergistic effect between the injury and employee's preexisting conditions of ill-being. We incorporate those findings herein.

The primary injury

On December 3, 2009, employee lifted a battery weighing approximately 125 pounds and experienced pain in his right shoulder and chest wall. Employee's symptoms continued, and he ultimately underwent an arthroscopic labral debridement and open subscapularis repair on February 23, 2010. The treating surgeon, Dr. Rhoades, released employee on August 13, 2010, with permanent restrictions of no overhead reaching or lifting, and no lifting over 50 pounds. Employee tried to return to work following the primary injury, but was unsuccessful.

Dr. Koprivica opined the accident of December 3, 2009, is the prevailing factor causing employee to suffer subscapularis and labral tears, which he rated at 20% permanent partial disability of the right shoulder. Employee settled his claim arising from the primary injury with the employer for a lump sum consistent with a rating of 22.5% permanent partial disability of the right shoulder. We credit Dr. Koprivica's causation opinion and find that employee suffered a 22.5% permanent partial disability of the right shoulder as a result of the primary injury.

Dr. Koprivica opined that employee is likely permanently and totally disabled owing to a combination of the effects of the primary injury and employee's preexisting conditions of ill-being. Employee's vocational expert, Michael Dreiling, agreed that employee is unable to compete for work in the open labor market owing to the primary injury in combination with employee's preexisting disabling conditions. Employee described in

Employee: Gary Scott

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considerable detail how the combination of his various injuries prevents him from continuously or regularly performing all of the various activities involved in his work for the excavating business. We note that employee's entire work history is limited to his experience in the excavating business.

We credit employee's testimony. We also credit the expert opinions from Mr. Dreiling and Dr. Koprivica. We find that employee is unable to compete for work in the open labor market owing to the primary injury in combination with employee's preexisting disabling conditions.

Conclusions of Law

Injury arising out of and in the course of employment

The parties asked the administrative law judge to determine whether employee sustained "an accident arising out of and in the course and scope of employment." *Transcript*, pages 2-3. It appears that the parties dispute whether employee suffered an injury arising out of and in the course of employment. Section 287.020.3(2) RSMo provides, as follows:

An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

The courts have interpreted the foregoing language to involve a "causal connection" test that employees must satisfy in order to prove that an injury has arisen out of and in the course of the employment. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510-11 (Mo. 2012).

We have found that on December 3, 2009, employee lifted a battery weighing approximately 125 pounds and experienced pain in his right upper extremity and chest wall, and we have credited Dr. Koprivica's causation opinion. There is no evidence on this record to suggest, let alone prove, that employee ever deviated from the course of performing his work for employer at the time of the primary injury. Nor is there any evidence that would suggest that the risk of lifting a heavy battery was unrelated to employee's employment; rather, all of the relevant evidence is to the contrary.

We must conclude that employee's injuries arose out of and in the course of employment, because employee's injuries did not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

Employee: Gary Scott

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Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have found that employee suffered from numerous preexisting permanent partially disabling conditions referable to both ankles, his right shoulder, and his low back at the time of the primary injury. We are convinced these conditions were serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of those preexisting conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found that employee suffered from preexisting permanent partially disabling conditions that amounted to hindrances or obstacles to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove his entitlement to such an award, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have found that, as a result of the accident on December 3, 2009, employee sustained a 22.5% permanent partial disability of the right shoulder, and credited the expert opinions from Mr. Dreiling and Dr. Koprivica that employee is permanently and totally disabled as a result of the primary injury in combination with his preexisting conditions of ill-being.

Employee: Gary Scott

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We conclude employee is permanently and totally disabled owing to a combination of his preexisting disabling conditions in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We reverse the award and decision of the administrative law judge.

The Second Injury Fund is liable for weekly permanent total disability benefits beginning August 13, 2010, at the differential rate of \$384.51 for 52.2 weeks, and thereafter at the stipulated weekly permanent total disability rate of \$807.48. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Mark Siedlik, issued August 28, 2012, is attached hereto solely for reference.

This award is subject to a lien in favor of Keith Yarwood, Attorney at Law, in the amount of 25% for necessary legal services rendered.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 10th day of June 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

**FINAL AWARD DENYING COMPENSATION
As to Second Injury Fund Only**

Employee: Gary Scott Injury No: 09-104877
Dependents: N/A
Employer: Scott Excavating (Settled)
Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund
Insurer: Travelers Commercial Casualty (Settled)
Hearing Date: March 7, 2012
Briefs Filed: April 17, 2012 Checked By: MSS/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: 1/11/2008, 12/3/2009
5. State location where accident occurred or occupational disease was contracted: Urich, Henry County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident occurred or occupational disease contracted:
08-058268: Working on uneven terrain performing excavation work when he felt pain in his low back
09-104877: Placing a battery into equipment injured right shoulder
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease:
08-058268: back and body as a whole
09-104877: right shoulder
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? Unknown
17. Value necessary medical aid not furnished by employer/insurer? Unknown
18. Employee's average weekly wages: Unknown
19. Weekly compensation rate:
08-058268: \$742.72/389.04
09-104877: \$807.48/422.97
20. Method wages computation: stipulation
21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: N/A

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Gary Scott

Injury No: 09-104877

Dependents: N/A

Employer: Gary Scott Excavating (Settled)

Additional Party: Treasurer of Missouri as Custodian of the Second Injury Fund

Insurer: Travelers Commercial Casualty (Settled)

The above Claim was heard on March 7, 2012. The parties stipulated to the following:

08-058268

1. On 1/11/2008, Employee was employed with Gary Scott Excavating
2. On 1/11/2008, Employer was operating under and pursuant to the Missouri Workers' Compensation law.
3. Employer received proper notice.
4. Permanent partial and permanent total disability rates

09-104877

1. On 12/3/2009, Employee was employed with Gary Scott Excavating
2. On 12/3/2009, Employer was operating under and pursuant to the Missouri Workers' Compensation law.
3. Employer received proper notice.
4. Permanent partial and permanent total disability rates

ISSUES

The parties requested the Division to determine (for each injury number):

1. Whether claimant sustained an accident or occupational disease arising out of and in the course of his employment
2. The nature and extent of permanent disability, including the liability of the Second Injury Fund.

Gary Scott, the claimant, is a seventy year old Caucasian male. Mr. Scott dropped out of school after the ninth grade to begin working as an excavator. Mr. Scott's entire career has been as a self-employed business owner excavating with heavy equipment and bailing hay. He has

trouble reading so his now-deceased wife and employees managed the business bookkeeping tasks. Mr. Scott's work duties over his fifty year career included pulling himself into heavy equipment, working on uneven ground, and supervising employees.

Pre-existing Disabilities

Mr. Scott had an open rotator cuff repair to his right shoulder in 1998. Mr. Scott had difficulty climbing and using his right shoulder. (Report of Dr. Koprivica, 8).

On November 4, 2001, Mr. Scott fell 22 feet from a grain bin and had multiple midfoot/forefoot fractures on both the right and left side and fractured his right tibia and left fibula. Mr. Scott hired staff to operate the business for two years after this injury. In 2005 he reported to his physician that he had so much pain he was unable to walk further than 50 feet without rest. At that time Mr. Scott began wearing specialized orthotics on both of his feet.

Mr. Scott had cochlear implants placed in 2002 to address serious hearing loss that had been developing since childhood. He has a very limited ability to use the phone and also has problems hearing certain voices. Mr. Scott reported problems hearing at work and that he may have lost work because of his hearing problems.

In 2007, Mr. Scott had problems with hernias. He had four hernias and his treatment included surgery. Dr. Wetzel and/or Dr. Scott asked Mr. Scott to quit working because of her hernia problems. It affected his ability to lift and bend on the job.

1/11/2008 Injury

Mr. Scott injured his low back on January 11, 2008 when he was driving a bulldozer over rough, frozen terrain. He developed spinal stenosis with noted neurogenic claudication which resulted in the development of disabling symptoms and a decompressive laminectomy at L3-L4. Mr. Scott reports severe low back pain and limitations on sitting and lifting associated with this injury.

12/3/2009 Injury

Mr. Scott was attempting to lift a 115 pound battery when he tore his right shoulder and chest. Dr. Rhoades performed an arthroscopic labral debridement and open subscapularis repair on February 23, 2010. Mr. Scott reports ongoing problems in his right shoulder. He limits his activities because he fears tearing his shoulder again.

Experts

Dr. Koprivica assigned: a 15% permanent partial disability rating to Mr. Scott's pre-existing shoulder problems at the 232 level, a 35% permanent partial disability rating to Mr. Scott's pre-existing 155 week level of the right leg, a 25% permanent partial disability rating to Mr. Scott's pre-existing left lower extremity above the ankle at the 155 week level, a 10% permanent partial disability rating to Mr. Scott's pre-existing hernia condition to the body as a whole. Dr. Koprivica declined to rate Mr. Scott's hearing loss but indicated it was a hindrance or

obstacle to employment. Dr. Koprivica assigned a 25% permanent partial disability to the body as a whole rating to Mr. Scott's 2008 back injury and a 20% permanent partial disability to the body as a whole rating to Mr. Scott's right shoulder and chest injury.

Dr. Koprivica suggested Mr. Scott should avoid any activity above the shoulder due to his right shoulder condition. He should avoid pushing or pulling with the right shoulder. He should also avoid repetitive reaching with the right arm. Mr. Scott should avoid frequent or constant bending at the waist, pushing, pulling or twisting. He should avoid sustained or awkward postures of the lumbar spine. He should avoid squatting, crawling, kneeling or climbing. He should have the ability to change postures, limiting standing and walk to fifteen minutes with flexibility of sitting when necessary. Captive sitting should be restricted to one hour with flexibility to get up when needed.

Mike Dreiling, a vocational expert, concluded that Mr. Scott was unemployable based on his vocational profile and his medical disability and limitations.

CONCLUSIONS AND FINDINGS

Mr. Scott was unemployable on the open labor market before either his January 11, 2008 or December 3, 2009 work injuries

For Second Injury Fund liability for permanent and total disability to exist, the previous disability and the last injury must combine together to result in permanent and total disability. V.A.M.S. § 287.2201, subd. 1. Mr. Scott is permanently and totally disabled as a result of his previous disabilities alone, and was not employable on the open labor market at the time of his 2008 and 2009 work injuries, in spite of working. His numerous disabilities pre-existing his 2008 work injury are outlined:

Mr. Scott tore his right rotator cuff in 1998. Dr. Koprivica noted disability from this injury in regard to climbing and using his right shoulder.

Mr. Scott fell 22 feet in 2001 which shattered bones in his leg and feet. He spent two years with his leg in a CAM walker. This injury significantly limited his walking and he still has considerable problems from his this injury to his lower extremities. Mr. Scott reported after this 2001 right leg injury he had a very difficult time getting on and off machinery and only maintained employment by being self employed. He was able to put the brunt of the work on his employees and participate only by overseeing the work. Mr. Scott saw Dr. Bellamy from St. Luke's Medical on March 29, 2007. Dr. Bellamy recorded at that visit that Gary reported not being able to walk even 50 feet without having to stop and rest because of the discomfort. Dr. Koprivica suggested restrictions based on Mr. Scott's lower extremity disability: limit walking and standing to 15 minutes and avoid climbing.

He also has a history of major hearing problems which require cochlear implants. The hearing problems date back as far as middle school. He dropped out of school because he could

not hear the teacher. He reads very little and cannot operate a computer making it difficult for him to do tasks related to operating an excavating business.

In 2007, Mr. Scott had several hernias. Mr. Scott (Exhibit 1, 22-24) reported that he never recovered from his hernias and that Dr. Scott, his primary care physician, told him to stop working and that he had to quit working.

Mr. Dreiling testified that Mr. Scott was “at a very distinct disadvantage” in competing for training and supervisory jobs for another company considering his hearing, communication skills and educational background. When the severe pain, and physical restrictions he faced from his lower extremity injuries, his hernias, and his first shoulder injury, it is clear that the only reason Mr. Scott was able to work was because he was majorly self-accommodating as a business owner. Until his retirement, Mr. Scott did continue to earn an income because he owned his own business, but only because he made major accommodations for himself regarding what equipment he would operate, and relying on his wives to perform more intellectually demanding tasks. Mr. Dreiling agreed that Mr. Scott would not have the availability of self-accommodation in the open labor market like he did in his own business and that no jobs exist in the open labor market that would let him simply show other employees how to operate equipment without performing some work himself. (Exhibit B, 37). The Second Injury Fund is not liable for Mr. Scott’s 2008 and 2009 work injuries as his permanent and total disability arises based on his injuries that pre-date 2008.

Angus does not apply in this case, even though there is only one expert report submitted into evidence. Angus v. Second Injury Fund, 328 S.W.3d 294 (Mo. App. W.D. 2010). Angus specifically states “that the commission may not substitute an administrative law judge’s personal opinion on the question of medical causation of [an injury] for the uncontradicted testimony of a qualified medical expert.” Id. at 300. An expert’s opinion may be contradicted by his own testimony. Carkeek v. Treasurer, 352 S.W.3d 604, 610 (Mo. App. W.D. 2011). “Extent of disability. . . is not so medically technical as to remove it from the expertise that is attributed to the Commission. The question whether a claimant is totally and permanently disabled is not exclusively a medical question.” Id. at 610, citing Crum v. Sachs Elec., 769 S.W.2d 131, 136 (Mo. App. W.D. 1989). The current case focuses on causation of disability while Angus centered on medical causation of an injury. Angus, 328 S.W.3d 294 at 300.

The Court can properly determine that the cause for permanent and total disability was Mr. Scott’s pre-existing problems. First, because nature and extent of disability is at issue, and not medical causation, the Court is free to look to the whole record and not just to the medical expert in the case. Nature and extent of disability is a separate issue from medical causation and extent of disability is not medically technical. Carkeek, 352 S.W.3d at 610. Second, according to Mr. Scott’s testimony, at least one doctor asked him to stop working when he began having hernias in 2007. Third, because the issue in this case is not medical causation of an injury, it is appropriate for the Court to make findings of fact regarding Mr. Scott’s abilities and disability before the last accident. Carkeek, 352 S.W.3d at 610. As outlined above, Mr. Scott’s hearing problems since childhood, his extremely limited ability to walk due to foot injuries, problems

from his first shoulder injury, and the pain and lifting limitations associated with his hernias, Mr. Scott was clearly permanently and totally disabled before 2008 and as such unemployable on the open labor market.

I find therefore, the Second Injury Fund has no liability to the Claimant for the injuries claimed on November 1, 2008 or December 3, 2009, and award no compensation.

Made by: _____

Mark Siedlik

Administrative Law Judge

Division of Workers' Compensation